

EXHIBIT 9

Harvey Kesner
8/8/2022

<p>1 UNITED STATES DISTRICT COURT 2 SOUTHERN DISTRICT OF NEW YORK 3 --o0o-- 4 SECURITIES AND EXCHANGE) 5 COMMISSION,) 6 Plaintiff,) 7) Case No. 8 vs.) 18 Civ. 8175 (ER) 9) 10 BARRY C. HONIG, ROBERT LADD,) 11 ELLIOT MAZA, BRIAN KELLER,) 12 JOHN H. FORD, GRQ CONSULTANTS,) 13 INC. and HS CONTRARIAN) 14 INVESTMENTS, LLC,) 15 Defendants.) 16 17 DEPOSITION OF 18 HARVEY KESNER 19 VIA REMOTE VIDEOCONFERENCE 20 MONDAY, AUGUST 8, 2022 21 22 Stenographically Reported by: 23 Victoria L. Valine, CSR, RMR, CRR, RSA 24 California CSR License No. 3036 25 Job No. 220808VV</p> <p>1</p>	<p>1 INDEX 2 WITNESS: HARVEY KESNER 3 EXAMINATION BY COUNSEL 4 Examination By Ms. Brown: 9 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>3</p>
<p>1 REMOTE APPEARANCES: 2 3 FOR PLAINTIFF: 4 SECURITIES AND EXCHANGE COMMISSION 5 BY: Nancy A. Brown, Esq. 6 Jack Kaufman, Esq. 7 100 Pearl Street, Suite 20-100 8 New York, New York 10004 9 212-336-1023 10 BrownN@SEC.gov 11 12 FOR DEFENDANT ROBERT LADD: 13 FORD O'BRIEN, LLP 14 Attorneys at Law 15 BY: Adam Ford, Esq. 16 Anjula Prasad, Esq. 17 575 Fifth Avenue, Floor 17 18 New York, New York 10017 19 212-858-0040 20 AFord@fordobrien.com 21 22 Also Present: Robert Ladd 23 24 25 (All parties appeared remotely via videoconference.)</p> <p>2</p>	<p>1 EXHIBITS 2 EXHIBIT NO. DESCRIPTION PAGE 3 Exhibit 4 Convertible Note Original Issue 49 4 Date: May 5, 2016 Principal 5 Amount: \$3,409.09 6 Bates No. LADD-MGT-00042975 - 7 LADD-MGT-00042991 8 Confidential 9 10 Exhibit 5 Letter Dated July 24, 2012 from 67 11 Anslow & Jaclin, LLP to Mr. Mike 12 Turner, Globex Transfer, LLC with 13 Attachments 14 Bates No. SEC-FINRA-E-0000643 - 15 SEC-FINRA-E-0000649 16 Exhibit 7 Letter Email Dated October 7, 2013 72 17 from Sichenzia, Ross, Friedman, 18 Ference, LLP to Equity Stock 19 Transfer 20 Bates No. COCP0082981 Confidential 21 Treatment Requested by Cocrysal 22 Pharma, Inc. 23 Exhibit 8 Letter Email and U.S. Mail Dated 74 24 September 25, 2013 from Sichenzia, 25 Ross, Friedman, Ference, LLP to Equity Stock Transfer Bates No. SD-SEC-(18Civ8175)-112151 Confidential Treatment Requested by JS/SCI/HSCI Exhibit 9 Letter Dated November 7, 2013 from 76 Fuse Science to Securities Transfer Corporation Bates No. SD-SEC-(18Civ8175)-093829 - SD-SEC-(18Civ8175)-093830 Confidential Treatment Requested by JS/SCI/HSCI Exhibit 18 Email Thread 123 Bates No. LADD-MGT-00059628 - LADD-MGT-00059632 Confidential</p> <p>4</p>

<p>1 answers to that list of companies, that you may have 2 invested individually or personally not necessarily 3 through any of those three entities that we talked 4 about. And so my question is: What guided your 5 decision about whether to invest through your investment 6 vehicles -- the three we mentioned, Paradox, Denville & 7 Dover, and Darwin -- or investing on your own in your 8 own name? 9 A. Where I had capital available at that moment 10 in time. 11 Q. Did you ever discuss any of these investments 12 with Mr. Ladd? 13 A. Not -- no. I don't believe so. 14 Q. Do you have any reason to know whether 15 Mr. Ladd was otherwise aware of your investments in any 16 of these issuers? 17 A. No. I don't think so. You know, there might 18 have been a filing where I might have had a -- you know, 19 an interest like, for example, in Spherix I was a 20 reporting -- Section 16 reporting officer, and it might 21 have had a footnote in it that said Paradox Lake is, you 22 know, an affiliate of Harvey Kesner. Some kind of 23 disclosure where it was in a public record. But I don't 24 otherwise have any idea why or how Mr. Ladd might have 25 known what connection those entities had with each</p> <p style="text-align: center;">45</p>	<p>1 Q. Does convertible bridge note ring a bell? 2 A. Don't recall. 3 Q. Okay. Do you recall that you invested in 4 D-Vasive convertible bridge notes that were convertible 5 into MGT shares? 6 A. I don't recall that, no. 7 Q. All right. In your prior answer you said you 8 met the person behind a series of opportunities. Was 9 that person Mr. McAfee? 10 A. Yes. It was Mr. McAfee. 11 Q. So just to sort of orient you to the timetable 12 that was involved in the MGT 2016 transaction involving 13 D-Vasive, that deal was announced on May 9, 2016. 14 Do you have a recollection of when it was that 15 you met with Mr. McAfee? 16 A. I -- I can remember the incident. I can't 17 tell you when it was. 18 Mr. Kaplowitz handled 99.9 percent of the 19 relationships with Mr. Ladd, similar to what I mentioned 20 earlier. And Mr. Kaplowitz was out of the country, I 21 believe, or out of town, and on short notice I had heard 22 that they -- that Mr. McAfee had wanted to have a 23 meeting, and they used my conference room, and I sat in 24 on that meeting and met him. 25 But, in terms of timing, I can tell you it was</p> <p style="text-align: center;">47</p>
<p>1 other. 2 And, of course, there's, you know, the very 3 public MabVax lawsuit, and also the -- I don't think 4 Darwin was formed at the time of the Haynes Boone 5 lawsuit, so I don't think Darwin would have been 6 mentioned, but Paradox probably -- most certainly was. 7 Q. Did you ever invest in MGT or D-Vasive? 8 A. I don't think MGT, but yes, D-Vasive. 9 Q. And what was the nature of your investment in 10 D-Vasive? 11 A. There had come a time where I had met the 12 person who was behind the creation of a series of 13 opportunities, and thought that those opportunities were 14 interesting in terms of putting a small amount of 15 capital to work before these companies really had 16 reached their trajectory, and through that coming 17 together of those entities I thought it made sense to 18 put a little bit of money into it. 19 Q. And -- 20 A. I don't believe it was MGT directly. I think 21 was D-Vasive or some holding company of D-Vasive that 22 was to be acquired by MGT. 23 Q. And what was the nature of your investment, do 24 you remember? What instrument was it? 25 A. Don't know.</p> <p style="text-align: center;">46</p>	<p>1 during the primary because I had learned that he was a 2 candidate for president in that sequence. They had just 3 come off of a tour. So if that gives you any timeline, 4 yes. 5 Q. And were the bridge notes discussed at that 6 meeting? 7 A. I don't know. I have no recollection of that. 8 Q. Do you remember who else was there? 9 You said you were there, Mr. McAfee was there. 10 Who else was there? 11 A. I know Mr. McAfee's body guard slash assistant 12 was there. I don't know who else was there. It may 13 have been Mr. Honig and maybe Mr. O'Rourke as well. I 14 think they were there as well, but I can't say for sure. 15 Q. Was Mr. Ladd there? 16 A. I don't really recall. I don't know if he was 17 there. 18 Q. And the purpose of the meeting was to discuss 19 the MGT acquisition of D-Vasive? 20 A. The purpose of the meeting was to borrow my 21 conference room, and I thought I would take an 22 opportunity to meet a -- you know, a world stage figure, 23 Mr. McAfee, for the first time. 24 Q. Okay. But what was the purpose of needing a 25 conference room?</p> <p style="text-align: center;">48</p>

1 would be a nod, or just I want to let you know, or I'm
2 just making you generally aware, that kind of thing. We
3 didn't have any formal policy or practice.
4 **Q.** All right. In the course of your work either
5 for issuers or directly from Mr. Honig, but with respect
6 to issuers in which Mr. Honig was investing, can you
7 tell us how many of those transactions also involved
8 investments by John Stetson?
9 **A.** Are you speaking about D-Vasive now or you
10 went broader?
11 **Q.** I went way broad.
12 **A.** Way broad. No. I couldn't tell you how many.
13 **Q.** Who is John Stetson?
14 **A.** John Stetson is a -- an individual investor,
15 business manager of sorts who served as an assistant, I
16 believe, first for Mr. Brauser and then as an assistant
17 to Mr. Honig.
18 **Q.** And did he work, to your understanding, out of
19 Mr. Honig's offices?
20 **A.** He did.
21 **Q.** Okay.
22 **A.** Not always there. I think in the point in
23 time that he worked with Mr. Brauser, it was
24 Mr. Brauser's office. Then there was a point in time
25 where I had seen him in Mr. Frost's suite at 4400

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1 Biscayne Boulevard. They all had offices in that
2 building for a period of time as well.
3 And then Mr. Honig had another office in
4 Boca Raton where Mr. Stetson had his main office as
5 well.
6 **Q.** So in the period from of 2012 to 2016 did you
7 have an understanding of where Mr. Stetson was working?
8 **A.** I can't tell you if it was Biscayne Boulevard
9 in Miami or it was Mr. Honig's offices in Boca, but it
10 was one of those two.
11 **Q.** And while Mr. Stetson was working at Biscayne
12 Boulevard, was Mr. Honig also working at Biscayne
13 Boulevard?
14 **A.** They had offices there. I don't know that
15 they were there every day together. I'm based in
16 New York, but I do know that I had attended some
17 meetings both in Biscayne Boulevard as well as in --
18 later -- it was a later period of time in Boca Raton.
19 But they all had offices there until Mr. Honig and
20 Mr. Stetson moved up to Boca.
21 **Q.** And what about Mr. O'Rourke, where did he
22 work?
23 **A.** It's the exact same answer. To my
24 recollection they -- I believe, was originally assistant
25 to Mr. Brauser. Then they each had individual offices

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1 in Biscayne Boulevard, and then later in Boca with
2 Mr. Honig.
3 **Q.** In any of the deals that you worked on that
4 involved Mr. Honig as an investor, did any of them also
5 involve investments by Stetson Capital?
6 **A.** I certainly remember seeing that name on
7 pieces of paper and in public filings, yes.
8 **Q.** And Stetson Capital was associated with whom?
9 **A.** Mr. Stetson, as far as I know. Although I can
10 say specifically I never saw the incorporation or
11 formation papers for Stetson Capital. But I'm going to
12 assume it was John Stetson's entity.
13 **Q.** And how about a company called HS Contrarian?
14 **A.** I think it's the same answer. I don't think I
15 ever saw formation papers for HS Contrarian. I, either
16 through reading in court filings or otherwise, you know,
17 came to be -- the understanding that it was somehow
18 jointly owned between Mr. Stetson and/or Mr. Honig.
19 And I had no reason to -- I had no reason to
20 doubt that was the case before reading any court filings
21 either. So I just never -- I don't believe I ever saw
22 the formation documents to be able to articulate who
23 owned it.
24 **Q.** And in the transactions that you worked on
25 that involved Mr. Honig was HS Contrarian also involved?

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1 **A.** I've certainly seen their names on investor
2 lists where they're both on that.
3 **Q.** How about an entity called OBAN, O-B-A-N,
4 Investments? Have you ever seen that name involved in
5 deals that involve Mr. Honig?
6 **A.** I don't recall OBAN, no.
7 **Q.** All right. In any of those deals that
8 involved Mr. Honig was Mr. O'Rourke also an investor?
9 **A.** I do recall seeing Mr. O'Rourke's name as well
10 on front end, you know, onboarding documents in which
11 investors were collectively investing in an entity or in
12 several entities, yes, their names would appear
13 together.
14 **Q.** And are you familiar with the name ATG
15 Capital?
16 **A.** I am.
17 **Q.** And what did you understand that entity to be?
18 **A.** I believe it was an entity of Mr. O'Rourke's.
19 Similarly, I never saw the formation papers, but I
20 believe he signed as the authorized person just like
21 Mr. Stetson would for HS.
22 **Q.** And did you see transactions involving
23 Mr. Honig that also involved ATG Capital?
24 **A.** I believe I've seen them on the same list of
25 investors or on documents in which the same investment

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<p>1 was made in the same entity. Not the same in terms of 2 amount, just the same parties were investing. 3 Q. How about Mark Groussman, did you ever see his 4 name involved in transactions that involved Mr. Honig? 5 A. Yes. 6 Q. And who do you understand Mr. Groussman to be? 7 A. Mr. Groussman is a -- I understand to be a 8 long-time family friend of the Honig family. 9 Q. Did he also work out of Mr. Honig's offices? 10 A. I think the answer is yes and no. I think he 11 had a desk there, but rarely was there. 12 Q. And did he have an entity called Melechdavid? 13 M-E-L-E-C-H-D-A-V-I-D. 14 A. Again, did he have an entity? 15 I never saw the formation documents, as far as 16 I know, so I couldn't say for sure, but I do believe he 17 was the authorized signer for Melechdavid documents. 18 Q. Did you see Melechdavid involved in 19 transactions that also involved Mr. Honig? 20 A. Yes. 21 Q. All right. How about Mr. Brauser -- Michael 22 Brauser, who is he? 23 A. A private investor. 24 Q. And did you ever see his name involved in 25 transactions that involved Mr. Honig?</p> <p style="text-align: center;">57</p>	<p>1 A. Correct. As far as I know, yes. 2 Q. And he had his own entity called Titan? 3 A. I'm not familiar with that name. I don't have 4 a recollection of that entity. 5 Q. All right. Did he also act as trustee for an 6 investment vehicle called Four Kids Investment? 7 A. Again, trustee is sort of a formal title that 8 would be created from formation documents. I don't know 9 if he was trustee. 10 Q. Did you understand that he controlled the 11 investment decisions for Four Kids Investments? 12 A. I don't -- the way you've asked it, you know, 13 do I understand that he controlled? I have no 14 understanding who controlled. I believe that he may 15 have signed as an authorized person for Four Kids. 16 Q. And do you have an understanding of who the 17 beneficiaries were of the Four Kids Investment Trust? 18 A. My understanding is they were Mr. Barry 19 Honig's four children. 20 Q. And -- okay. 21 And did you see Mr. Jonathan Honig or Four 22 Kids Investment involved in transactions that also 23 involved Mr. Barry Honig? 24 A. Yes. 25 Q. Okay. Is it fair to say, Mr. Kesner, that</p> <p style="text-align: center;">59</p>
<p>1 A. Ever? Yes. 2 Q. And are you familiar with an entity called 3 Marlin Capital, M-A-R-L-I-N? 4 A. There were, I believe, several Marlin Capital 5 iterations, but I do remember Marlin Capital. I don't 6 know if it was an Inc., or partners, or something 7 like -- I don't know the full name, but there was a 8 Marlin Capital of some sort. 9 Q. And do you know to whom it was associated? 10 A. I do not. As the other answers indicated, I 11 didn't have their incorporation, or formation, or 12 issuance documents. My familiarity was that it was a 13 Michael Brauser entity, though. I don't know who owned 14 it specifically. 15 Q. What about Grander Holdings, G-R-A-N-D-E-R? 16 A. I think it's the same answer. I think it was 17 associated with Mr. Brauser, and I never saw the 18 incorporation documents so I don't know who actually 19 owned it or controlled it. 20 Q. And did you see either Marlin Capital or 21 Grander Holdings involved in transactions that also 22 involved Mr. Honig? 23 A. Yes. 24 Q. And then Jonathan Honig, that's Mr. Honig's 25 brother; is that right?</p> <p style="text-align: center;">58</p>	<p>1 Mr. Honig, Stetson, O'Rourke, Groussman, Jonathan Honig, 2 and Brauser were frequent co-investors? 3 A. I think there's a continuum of time in which 4 that answer has to be qualified. Certainly not in the 5 period when I was at Olshan Grundman. 6 Probably towards the end of my tenure at 7 Haynes and Boone some of those names would start to 8 appear. And then during the period at Sichenzia those 9 names would frequently, but not always, be names that 10 were making available investment opportunities where 11 they would invest as a -- as individual investors into 12 an opportunity that was presented or developed by one or 13 more of them. 14 Q. Thank you. 15 MS. BROWN: If it's all right with everyone I 16 think we should take like a 10-minute break. We've been 17 going for about an hour and 15 minutes, and I'm at a 18 stopping spot. 19 So why don't we reconvene at 11:25. 20 MR. FORD: Okay. Thank you. 21 THE WITNESS: Perfect. 22 MS. BROWN: All right. So, Mr. Kesner, just 23 put yourself on mute, please. 24 (Off the record at 11:13 a.m. Back on the 25 record at 11:28 a.m.)</p> <p style="text-align: center;">60</p>

1 having invested in Superlight through Paradox?
 2 **A.** From 2012 I do not have any recollection of
 3 it, no.
 4 **Q.** All right. And turning back to the first page
 5 of Kesner Exhibit 5 in the one, two, three, fourth
 6 paragraph down, it refers to,
 7 "It is our opinion that the shares are to
 8 be issued without legend to the individuals
 9 listed on Schedule 2, annexed hereto, in
 10 accordance with Rule 144(b) and (d) under
 11 the 1933 Act."
 12 Do you see that?
 13 **A.** I do.
 14 **Q.** All right. Does that refresh your
 15 recollection in any respect that you and the individuals
 16 listed on Schedule 2 were attempting to have the
 17 restrictive legend removed from Superlight Securities in
 18 connection with this transfer?
 19 **A.** I don't have any recollection of this.
 20 Obviously the words speak for themselves. It seems to
 21 suggest that, but I don't recall this at all.
 22 **Q.** And do you have a recollection of whether, at
 23 least you, on behalf of Paradox, were attempting to have
 24 the restricted legend removed in order to prepare the
 25 shares for sale -- resale? Resale.

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1 **A.** No. Again, no, but let me be a little bit
 2 more specific, Ms. Brown. They're not necessarily being
 3 prepared for sale or resale, they're being prepared to
 4 be able to be accepted in a brokerage account in the max
 5 of undifferentiated securities that are represented by
 6 the CD and company reference on a transfer agent's
 7 record.
 8 It does not connote any preparation for sale,
 9 but it would be the first step in having a deposit made
 10 into a brokerage account. No reflection, whatsoever, on
 11 a selling intention, or selling timing, or pricing, or
 12 anything like that. That's really a misdirection.
 13 But, to the extent that you asked the question
 14 about whether it refreshes my memory as to whether or
 15 not I had made a request in Paradox Capital to remove a
 16 legend in preparation for sale, the answer is no. You
 17 can surmise what you like from the words on the paper,
 18 but it's not -- I have no recollection of making that
 19 request.
 20 **Q.** In your experience can you sell securities on
 21 the public market that bear a restricted legend?
 22 **A.** When you say "on the public market," I assume
 23 you mean through the medium of a national stock exchange
 24 or the bulletin board, one of those automated quotation
 25 services.

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1 No. My recollection is you cannot sell
 2 without having gone through the process to remove a
 3 legend or remove the restriction, of which Rule 144 is
 4 the safe harbor way to do it. One way to do it.
 5 **Q.** Mr. Kesner, do you have any understanding of
 6 how much Sichenzia charged for its issuance of Rule 144
 7 opinions?
 8 **A.** There was a range of charges from, you know,
 9 nothing -- absorbed in a company's monthly retainer,
 10 where the company chose to do that on behalf of its
 11 investor universe -- to a high of \$750. That's really
 12 the range.
 13 **Q.** And how is the range determined? Like what
 14 would -- why would someone be charged \$750?
 15 **A.** Some issuers, for example, in -- you mentioned
 16 Hudson Bay. I recall their documentation, I believe,
 17 requires that the issuer pay the fees or assume the cost
 18 of its investors with their 144 processes. And if that
 19 company happens to be on a monthly retainer, as is often
 20 the case in 34 Act reporting work, there would be no
 21 charge contractually because our engagement letter with
 22 them might say including Rule 144 opinions, including
 23 8-Ks, things like that.
 24 But that's fundamentally between the issuer
 25 and its investors at the time of onboarding an investor

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1 or a series of investors. In other cases it's
 2 arbitrarily determined by the partner in charge and
 3 responsible for the client.
 4 And, you know, these kinds of -- the costs of
 5 these kinds of opinions are not a real profit leader at
 6 a firm so, you know, as a courtesy or relationship
 7 building, one might say I'll do it for 250. And if you
 8 have an annoying client or annoying person that you
 9 don't have a relationship with, you might say hey, it's
 10 1500 -- I think it's more like 750, but it's very much
 11 arbitrary.
 12 The base rate at most firms today is 750. So
 13 I generally was charging 750. But Mark, and Greg, and
 14 other partners, Jay, I have no idea what they would have
 15 charged. And, you know, as a manager of the firm, I
 16 didn't care.
 17 **Q.** All right. Thank you.
 18 So let's move to Kesner Exhibit 7, which is
 19 number 7 on your list.
 20 (Deposition Exhibit 7 marked.)
 21 BY MS. BROWN:
 22 **Q.** For the record, while you're pulling that up,
 23 Mr. Kesner, Kesner Exhibit 7 is an opinion on the
 24 letterhead of Sichenzia, Ross, Friedman, Ference, LLP
 25 dated October 7, 2013, "Re: BioZone Pharmaceuticals,

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<p>1 that your understanding?</p> <p>2 A. I don't know about this particular</p> <p>3 transaction, but I had been introduced to him as</p> <p>4 somebody who managed some money and was a private</p> <p>5 investor.</p> <p>6 Q. And your understanding was that he was a</p> <p>7 co-investor with Mr. Honig on certain transactions; is</p> <p>8 that right?</p> <p>9 A. I don't -- I wouldn't use the word</p> <p>10 "co-investor." I would use the word he was a private</p> <p>11 investor who had an opportunity to look at certain</p> <p>12 transactions in which Mr. Honig might have been an</p> <p>13 investor with some other people as well.</p> <p>14 Q. And why do you tell Ms. Guarneri-Ferrara she</p> <p>15 needs to send a separate email to him?</p> <p>16 A. I think they were circulating documents at</p> <p>17 Mr. Kaplowitz's request or Mr. Ladd's request to</p> <p>18 prospective investors.</p> <p>19 Q. Okay.</p> <p>20 A. I think it was just a courtesy.</p> <p>21 Q. So why not on the same email is my question?</p> <p>22 A. Why not what on the same email?</p> <p>23 Q. Well, you say,</p> <p>24 "Send a full set of the unit offering to</p> <p>25 Barry, Stetson, and Tom Hunter. Send a</p> <p style="text-align: center;">113</p>	<p>1 (The lunch recess was taken at 12:45 p.m.)</p> <p>2 --o0o--</p> <p>3 (The proceedings resumed after the lunch break</p> <p>4 at 1:49 p.m.)</p> <p>5 MS. BROWN: Back on the record.</p> <p>6 BY MS. BROWN:</p> <p>7 Q. Mr. Kesner, could you turn to the document</p> <p>8 marked number 17, which has previously been marked as</p> <p>9 TGF Exhibit 7, which is an email from Mr. Ladd to</p> <p>10 Ms. Guarneri-Ferrara, Mr. Marcus, Mr. Kaplowitz, you,</p> <p>11 and Mr. Traversa.</p> <p>12 Do you recognize TGF Exhibit 7?</p> <p>13 A. Not specifically.</p> <p>14 Q. All right. Well, let's go through it a little</p> <p>15 bit and see if it refreshes your recollection.</p> <p>16 So Mr. Ladd is providing edits to the</p> <p>17 documents that he's been provided, and he writes, "MGT</p> <p>18 edits attached."</p> <p>19 Below that he writes,</p> <p>20 "Also section 9. Is it the intention to</p> <p>21 allow preferred holders to vote? Or maybe</p> <p>22 I'm reading this incorrectly. My guess is</p> <p>23 that none of the investors want to have a</p> <p>24 vote to tank their Section 13 or Section 16</p> <p>25 obligations."</p> <p style="text-align: center;">115</p>
<p>1 separate email to Hunter."</p> <p>2 A. I -- they're not -- they're separate</p> <p>3 investors. I would tend not to, you know, share emails</p> <p>4 of people with one another. So I probably was saying</p> <p>5 protect the confidential nature, and just send, you</p> <p>6 know -- we don't show -- when we use -- when we send out</p> <p>7 information to shareholders of a company or prospective</p> <p>8 investors, we usually do it by bcc's, not cc's, so they</p> <p>9 don't all get everyone else's mailing list. It's just</p> <p>10 sort of normal practice.</p> <p>11 This specific case I can't speculate why,</p> <p>12 other than Tom Hunter, didn't -- you know, he wasn't --</p> <p>13 he was sort of new to me. I didn't really know who he</p> <p>14 was and wouldn't have wanted to communicate with him in</p> <p>15 a group sense. I would have wanted to communicate with</p> <p>16 him in an individual sense.</p> <p>17 Q. Okay. Understood.</p> <p>18 MS. BROWN: So I'm at a breaking point. It's</p> <p>19 12:44. I suggest we take lunch now. Back in an hour?</p> <p>20 THE WITNESS: I'd like to ask you a question</p> <p>21 about timing. I mean, if you have another half hour's</p> <p>22 worth, we could push through it. If you have a whole</p> <p>23 day's worth, then let's take lunch.</p> <p>24 MS. BROWN: It's certainly not a half an hour.</p> <p>25 THE WITNESS: Okay.</p> <p style="text-align: center;">114</p>	<p>1 Do you see that?</p> <p>2 A. I see that.</p> <p>3 Q. All right. Do you have an understanding what</p> <p>4 Mr. Ladd was saying there?</p> <p>5 A. I understand what he's saying, yes, now -- at</p> <p>6 this time -- I understand it now, yes.</p> <p>7 Q. Okay. What is he saying?</p> <p>8 A. Yeah. I think he's inquiring whether</p> <p>9 preferred stockholders would vote on an as-converted</p> <p>10 basis with common stockholders.</p> <p>11 Q. And what implication did you understand there</p> <p>12 to be with a vote on Section 16 or Section 13</p> <p>13 obligations?</p> <p>14 A. I did not have any understanding that I am</p> <p>15 recalling now. I can say that it is my understanding,</p> <p>16 at this time, today, that the beneficial ownership rules</p> <p>17 relating to Section 13 or Section 16 reporting -- and as</p> <p>18 you mentioned, potentially disgorgement -- are</p> <p>19 inapplicable to non-voting shares.</p> <p>20 Q. What did you do after you received this email</p> <p>21 and that comment, if anything?</p> <p>22 A. I just opened the exhibit and read it with you</p> <p>23 and responded to your question.</p> <p>24 What do you mean?</p> <p>25 Q. No, I meant when you got it --</p> <p style="text-align: center;">116</p>

1 A. I don't know what you mean.
 2 Q. -- when you got it in 2012.
 3 A. I have no idea. I don't recall getting it in
 4 2012.
 5 Q. Do you recall a conversation with Mr. Honig
 6 about that comment?
 7 A. No, I do not.
 8 Q. How about any other investors?
 9 A. No recollection of receiving it or having
 10 conversations about it.
 11 Q. All right. Have you -- had you ever
 12 considered the notion of group status under Section
 13 13(d) prior to 2012?
 14 A. Ever? Um -- I think when I was a staff
 15 member, routinely questions came up regarding group
 16 status. I think at every one of my law firms
 17 previously -- whether it was Akin Gump, Stroock,
 18 ownership interest of my executives and directors at
 19 American Banknote when I assisted them with their
 20 reporting obligations, Olshan, Haynes Boone, my own
 21 personal reporting -- I have for 35 years considered --
 22 if that's the word you're asking me to respond to --
 23 considered Section 13 -- Section 16, 13 type reporting
 24 allegations.
 25 Q. And particularly the concept of group?

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1 A. I'm familiar with the SEC literature around
 2 group reporting obligations through rules, regulations,
 3 releases, commentary, and litigation.
 4 Q. And in those various contexts, have you ever
 5 made a decision that the investors you were considering
 6 were acting as a group?
 7 A. I think you're asking me to share with you
 8 legal advice I may or may not have given. I'm going to
 9 decline.
 10 Q. I'm not asking about to whom you gave that
 11 advice. I'm simply asking if you ever determined that a
 12 group of investors that you were considering were acting
 13 as a group under Section 13(d)?
 14 A. In MGT or ever in 35, 40 years of practice?
 15 Q. In -- ever in your 35 or 40 years of practice.
 16 A. I believe I made some enforcement division
 17 referrals, when I was in Division of Corporation
 18 Finance, regarding group-type issues. Other than that,
 19 I have no specific recollection, no.
 20 Q. How would you make a determination of that
 21 nature, whether a group of investors was acting as a
 22 group under Section 13(d)?
 23 A. I would rely on the SEC's historical
 24 statements, pronouncements, rules, and regulations
 25 regarding what constitutes a group.

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1 Q. Would you ask questions of the investors?
 2 A. Not necessarily.
 3 Q. But you might?
 4 A. Not necessarily.
 5 Q. Okay. Under what circumstances would you not
 6 ask investors questions?
 7 A. Well, I think -- I think context is all
 8 important in responding to your question, and the group
 9 activity that triggers reporting is activity that's more
 10 attuned to after the point in time that they're
 11 investors, not when they're thinking about becoming
 12 investors.
 13 The literature and practice, of course,
 14 suggests that when five people choose to participate in
 15 an investment together, that is not indicative of a
 16 group. It's whether they're exercising -- choosing to
 17 exercise voting or -- or investment -- making investment
 18 type of decisions collectively.
 19 Again, you know, let's go back to the example
 20 of an underwritten offering. You have 200 investors. .
 21 They're all investing on the exact same terms, at the
 22 exact same time, exact same instrument, exact same
 23 company, share, and counsel. I don't think anyone would
 24 argue that makes a group.
 25 And I think that same principle would apply

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1 when 5, 6, 7, 10, 20 investors are coming together in a
 2 private placement to purchase securities in a company.
 3 It's what they do when they have that instrument,
 4 whether it's joining voting together, or electing to
 5 dispose, or -- or exit the transaction together that
 6 implicates whether they're a group for reporting
 7 purposes.
 8 And that's on their lap, not on my lap. So I
 9 generally don't -- wouldn't ask that question at this
 10 point in time regarding what -- you know, what your
 11 question is directed to.
 12 At the point in time that 10 investors are
 13 coming together to invest under a term sheet, I wouldn't
 14 have to think hard about whether or not that makes them
 15 a group because I don't know what else they're doing. I
 16 don't know what voting they have decided among
 17 themselves, and it's not something I would inquire
 18 about.
 19 Q. And if you were representing an issuer, and an
 20 issue arose to your attention about whether certain
 21 investors were acting as a group for Section 13(d)
 22 purposes, how would you handle that situation?
 23 How would you answer the question of whether
 24 they are acting as a group?
 25 A. I don't -- I wouldn't approach it as to

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1 emails, including one from Mr. Honig dated October 18,
2 in which he writes,
3 "Below is the allocation for MGT. Rich
4 Abbe will give you his friend's name for
5 the shelf."
6 Do you see that?
7 **A.** I do.
8 **Q.** So does that refresh your recollection of
9 knowing who the investors were in the 2012 MGT
10 transaction?
11 **A.** I -- I don't -- unless I saw who actually
12 wired money and a closing statement, I wouldn't be
13 certain that these are a list of people who actually
14 invested, but it's not a far reach to say that this is
15 the universe of people who were being shown the deal for
16 purposes of investing.
17 **Q.** And the email right above the one we were just
18 looking at from Mr. Marcus, in which he writes,
19 "Are they acting as a group?"
20 **A.** I see that.
21 **Q.** And you write, "no --"
22 **A.** I see that.
23 **Q.** -- with an exclamation point.
24 **A.** I see that.
25 **Q.** So did Marcus ever tell you why he was asking

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1 that question?
2 **A.** No.
3 **Q.** Did Mr. Kaplowitz?
4 **A.** No. Not that I recall. Not that I recall we
5 had any dialogue about it whatsoever.
6 **Q.** And how did you determine that the answer was
7 no?
8 **A.** Well, Hudson Bay is, you know, one of the
9 larger investors. They are a -- I don't know,
10 \$50 billion fund. I do not think that they would be
11 acting as a group. And I'm well aware that their --
12 their documentation a thousand percent -- a hundred
13 percent prevents group formation by creating beneficial
14 ownership blockers with themselves and anyone else that
15 they could be deemed to be beneficial owners with.
16 So documentation-wise, contractually, SEC
17 rules and regulation-wise, one would be very safe in
18 concluding that Hudson Bay was not participating in the
19 control of the vote or investment decisions with Jill
20 Strauss.
21 Same answer for Iroquois. Iroquois is a -- as
22 far as I know, a -- you know, a 10, or 50, or
23 \$100 million private equity fund, and their document --
24 they're well represented. I think I've known their
25 counsel over the years. I don't recall his name right

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1 now.
2 And they are very sophisticated, and I would
3 imagine that they would never enter into documentation
4 that would allow them to become a group and the
5 traditional notions, SEC rules and regulations, with any
6 other party on this list.
7 So knowing -- knowing those -- going into the
8 question like that, you know, it seems like a stupid
9 question. And I think that that was the nature of the
10 exclamation mark, why I don't -- we rely on the
11 documentations, and the activities, and the contractual
12 provisions, as we said before, that limit the creation
13 of groups consistent with compliance with the SEC rules
14 and regulations and what beneficial ownership literature
15 says to do.
16 **Q.** So if two investors decided to invest, and
17 hold, and dispose of their shares together, but their
18 agreement said that they were not acting together, that
19 would be enough for you to determine those two investors
20 were not acting as a group?
21 **A.** I'll -- I'll repeat what I said before, maybe
22 with some different words to help everyone understand.
23 The going into the transaction isn't determinative for
24 what is the group. It's the acting in concert for
25 purposes of voting or disposition of securities that

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1 largely is the arbiter, based upon the literature, of
2 what is a group.
3 So I would have no way of knowing. But if
4 Rich Abbe at Iroquois called Joe up and said hey, let's
5 get rid of this guy, Rob Ladd. At the upcoming meeting
6 let's vote and let's waive our beneficial ownership
7 blocker so that we can vote our 20 percent, rather than
8 our 9.9 percent each, that would create a group.
9 But that's -- you have no awareness of that
10 happening behind the curtain of their executive offices.
11 You would have no way of knowing it. Nor would you
12 expect that to be the case, you know, logically in terms
13 of your practice when they're writing the check to buy
14 the instrument that says I am not a beneficial ownership
15 of more than 9.9 percent. We're entitled to rely on
16 that.
17 **Q.** Thank you.
18 So did you ever talk to any of the investors
19 listed on AM Exhibit 1 about whether they had any
20 agreements to vote, or dispose, or hold their shares in
21 concert?
22 **A.** Which exhibit?
23 **Q.** The one we're looking at.
24 **A.** Oh, I'm sorry.
25 **Q.** AM Exhibit 1.

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